

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEAN R. KELLEHER,

Plaintiff,

v.

THE KROGER COMPANY, doing
business as Kroger MTL Management,
LLC and FRED MEYER STORES,
INC., an Ohio corporation doing
business in Washington,

Defendant.

NO: 2:13-CV-3108-RMP

PROTECTIVE ORDER

I. PROTECTIVE ORDER

1. Scope and Purpose of This Order:

This Protective Order shall govern the designation and handling of protected documents produced by any Party in discovery in this litigation, whether by voluntary production or disclosure or in response to any formal discovery procedure, including designation and handling of nonpublic information of a confidential nature. This Protective Order does not affect any Party's obligations

1 under the Federal Rules of Civil Procedure to produce documents as required by
2 the rules of discovery or an order of the Court. The purpose of this Protective
3 Order is to facilitate the handling of nonpublic information of a confidential or
4 proprietary nature. If a designating Party files a “confidential” document (defined
5 below) in court and does not attempt to file it under seal, or if a document is
6 otherwise already part of the public record as of the entry of this Order, the
7 document(s) in question will not be subject to this Protective Order. The mere
8 filing of the “confidential” document by the non-designating Party does not
9 remove the document from the protection of this order. Although it is anticipated
10 that the Parties filing documents will comply with the terms of this Protective
11 Order, if a non-designating Party files a document marked “confidential” by the
12 non-filing Party, the non-filing Party may seek appropriate relief from the Court to
13 ensure protection under this order.

14 **2. “Confidential Material” includes:**

15 **a.** Personnel records pertaining to any current or former employee
16 of any Defendant that contain personal, payroll or financial information. Good
17 cause exists to protect the privacy rights of Defendants’ current and former
18 employees (if any) who are not Parties to this litigation. These files include these
19 individuals’ personal identifying information and financial account information.
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1 No public interest is served by requiring public disclosure of an individual's
2 private and personal information in a matter in which he or she is not a Party.

3 **b.** Good cause exists to protect Defendants' confidential
4 and proprietary business information, which provides it with a business advantage
5 over its competitors. To the extent the documents relate to matters that Defendants
6 take significant steps to protect in their daily operations, including through the use
7 of non-disclosure and confidentiality agreements with its employees (if any), such
8 information can be designated as confidential. No public interest is served by
9 requiring Defendants to disclose information they strive to maintain confidential
10 and proprietary in their business operations and which would harm their business
11 operations if disclosed.

12 **c.** Medical records and healthcare information pertaining to
13 Plaintiff, or any non-party, to the extent the information is discoverable. Good
14 cause exists to protect the highly sensitive and private nature of all medical records
15 from non-Party access. No public interest is served by making any medical records
16 of Plaintiff or any non-Party publicly available.

17 **d.** Financial records of the Parties, including payroll records and
18 other records reflecting wealth or earnings. Good cause exists to protect private
19 financial records from non-Party access. No public interest is served by these
20 records being publicly available.

1 **3. Standard for Protected Documents:**

2 Any person who is required to produce documents or information in
3 discovery in this litigation may designate material produced as a protected
4 document(s) pursuant to this Protective Order. All designations must be based on
5 the good faith belief that the information constitutes “Confidential Material” as
6 defined above.

7 **4. Protected Documents:**

8 Protected document(s) are those that contain “Confidential Material” as
9 defined above, and are marked “CONFIDENTIAL” by any Party. These
10 documents, referred to hereinafter as “protected documents,” will be covered by
11 this Protective Order and will be used only for the purposes of this case, and will
12 not be used by any Party or his or her counsel for any purpose unrelated to this
13 case.

14 **5. Designating Protected Documents:**

15 **a. Marking Protected Documents:** Protected documents shall be
16 designated as confidential by affixing to them the legend “CONFIDENTIAL” in a
17 size and location that makes the designation readily apparent, preferably in the
18 lower right hand corner. Any records received from third parties by stipulation or
19 through the discovery provisions of the Federal Rules of Civil Procedure that
20 would in the good faith belief of Counsel constitute protected material can be

1 designated by a Party as “Confidential Material” as defined herein if such request
2 is made reasonably promptly by letter.

3 **b. Designating Deposition Testimony:** Any Party who has
4 designated a document as protected pursuant to Paragraph 2 of this Protective
5 Order may designate testimony concerning that document as “Confidential
6 Information” in a deposition by making a statement to that effect on the record at
7 the deposition or other proceeding. When Confidential Information is designated
8 on the record at a deposition, the Party claiming the testimony is Confidential shall
9 make arrangements with the court reporter taking and transcribing such proceeding
10 to label each page containing the testimony with the designation “Confidential”
11 and to separately bind such pages as a “Confidential” addendum. Absent
12 stipulation of the Parties on the record at the deposition, it is subject to dispute as
13 set forth in Paragraph 9.

14 **c. Subsequent Designation:** If a Party discovers that, through
15 inadvertence, documents containing Confidential Information have been provided
16 to the opposing Party without being properly designated under this Order, the
17 producing Party shall promptly notify the receiving Party in writing of the error.
18 The notification shall include an identification of the documents or information (by
19 control number or some other specific form of identification), and the receiving
20 Party shall affix a stamp identifying each document or item of information so

1 identified as “CONFIDENTIAL” unless the parties agree that some other
2 procedure for remedying the inadvertence is more appropriate under the
3 circumstances.

4 **6. Maintaining Designated Protected Documents:** Any protected
5 document must be maintained in a manner reasonably calculated to preserve its
6 confidentiality.

7 **7. Disclosure of Protected Documents:**

8 **a.** Except as set forth herein or by any subsequent court order, no
9 protected documents shall be delivered, exhibited, or disclosed to any persons
10 unless done in a manner in compliance with this Protective Order.

11 **b.** The Parties’ counsel shall require all persons, except those
12 referred to in paragraph 7(c)(i), (ii), (iii), (v), (vi), and (viii), before being given
13 access to any protected document, to read and agree to be bound by this Protective
14 Order by endorsing the certification attached as Exhibit A. Counsel shall retain this
15 certification.

16 **c.** Protected documents may be delivered, exhibited, or disclosed
17 to the following persons subject to the limitations of this Protective Order:

18 (i) Counsel representing the named Parties in this case and any
19 paralegal, clerical, or other employee of such counsel assisting in the
20 prosecution or defense of this litigation;

1 (ii) Any copying services hired by counsel to copy documents
2 in bulk;

3 (iii) The Court or any Court personnel;

4 (iv) Any person testifying, attending a deposition, designated as
5 a witness, or scheduled for a deposition who is not a Party or
6 employee of a Party;

7 (v) Any person identified as having authored or having
8 previously received the protected document(s);

9 (vi) The Parties and their client representatives, insurance
10 carriers, and/or counsel for their insurance carriers for any purpose in
11 this litigation;

12 (vii) Current or former employees or agents that a Party deems
13 necessary to the presentation or defense of claims in this litigation;

14 (viii) A Mediator(s) retained by the Parties; or

15 (ix) Consulting experts or expert witnesses whose review a
16 Party deems necessary to the presentation or defense of claims in this
17 litigation.

18 **d.** A Party that files with the Court materials designated as
19 protected documents under Section 2 or any pleading or memorandum purporting
20 to reproduce such information, and who seeks to have the record containing such

1 information sealed, shall submit to the Court a motion to seal, pursuant to Local
2 Rule 7.1.

3 **e.** This Protective Order does not apply to information obtained by
4 or made available to any such person by means other than the discovery provisions
5 of the Federal Rules of Civil Procedure, and except for good cause shown, such
6 information need not be filed under seal when submitted to the Court.

7 **8. Producing Party's Use of Protected Documents:** Nothing in this
8 Protective Order limits a producing Party's use of its own documents or documents
9 obtained through means other than discovery requests or subpoenas in this
10 litigation. Such disclosures shall not affect any other documents that are subject to
11 confidential designation made under the terms of this Protective Order.

12 **9. Disputes as to Confidentiality Designation:**

13 **a. Meet and Confer Requirement:** The Parties agree to designate
14 information as "Confidential" on a good faith basis and not for purposes of
15 harassing the receiving Party's access to information concerning the lawsuit. If any
16 Party believes that a document, tangible item or other information that has been
17 designated as Confidential is not entitled to be treated as Confidential, the Party
18 will notify the designating Party of its objection to the Confidential designation.
19 The Parties shall meet and confer in an attempt to reach an agreement regarding
20 the confidential status of the document, tangible item or information within five (5)

1 business days after the objecting Party has provided written notice to the
2 designating Party of its objection.

3 **b. Motion for Protective Order:** If the objection is not resolved,
4 the objecting Party may file a Motion for an order permitting disclosure of any
5 matter the objecting party asserts was improperly identified as Confidential.

6 **c. Status Pending Resolution of Dispute:** Any disputed
7 document or other material must be treated as a protected document under this
8 Protective Order until entry of a Court order ruling otherwise.

9 **10. Rights of Parties:**

10 This Protective Order is without prejudice to the right of any Party to apply
11 to the court for any further protective order relating to any confidential information
12 or for an order permitting disclosure of any confidential information beyond the
13 terms of this Protective Order.

14 **11. Procedures upon Termination of Action:**

15 Within thirty (30) business days following any final settlement or the
16 running of any applicable time to appeal a final order entered in this litigation, all
17 parties shall either (i) return to the person who produced such materials all copies
18 of all protected documents obtained through discovery in this action or otherwise,
19 or (ii) certify to the person that all protected documents have been destroyed,
20 except that counsel for each party may retain in its files one copy of each pleading,

1 brief or document filed with the court, and deposition, trial transcripts and exhibits
2 thereto, and correspondence, subject to the provisions of this Order. Copies of
3 protected documents that have been filed with the Court may be returned to the
4 filing party by the Clerk of the Court, or destroyed.

5 The District Court Clerk is directed to enter this Order and provide copies to
6 counsel.

7 **DATED** this 5th day of March 2014.

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9 *s/ Rosanna Malouf Peterson*
10 ROSANNA MALOUF PETERSON
11 Chief United States District Court Judge
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